



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET, SW  
ATLANTA, GEORGIA 30303-3104

June 2, 2020

**MEMORANDUM**

**SUBJECT:** EPA Region 4 Endangered Species Act Section 7(d) Determination Relating to the Expansion of the Mobile Harbor Ocean Dredged Material Disposal Site

**FROM:** Jeaneanne M. Gettle, Director  
Water Division

**TO:** FILE

This Memorandum documents the determination by EPA Region 4 (EPA), pursuant to Sections 7(a)(2) and 7(d) of the Endangered Species Act (ESA), that EPA proceed with expansion of the Mobile Ocean Dredged Material Disposal Site (ODMDS) prior to the completion of consultation with the National Marine Fisheries Service (NMFS) under Section 7(a)(2).

**BACKGROUND**

The EPA is proposing to expand the Mobile ODMDS from an area of 4.75 square nautical miles (nmi<sup>2</sup>) to an area of 23.8 nmi<sup>2</sup> to accommodate future disposal needs. The EPA published a draft Environmental Assessment (EA) for public comment from September 26, 2018 through October 29, 2018 and from October 17, 2019 through November 20, 2019. The EPA published the proposed Rule for public comment from June 25, 2019 until August 9, 2019. The EPA has reviewed public comments, developed responses to those comments, and is preparing to issue the final EA, Finding of No Significant Impact (FONSI), along with the final Rule.

The EPA is required, pursuant to Section 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2), to consult with federal wildlife agencies and ensure that agency action does not jeopardize the continued existence of any endangered or threatened species or result in destruction or adverse modification of the critical habitat of such species. In order to fulfill this obligation, the EPA sent a letter to NMFS on September 25, 2018, and requested concurrence with EPA's determination that the modification of the Mobile ODMDS is not likely to adversely affect federally listed endangered species or critical habitat. On August 26, 2019, the EPA notified NMFS that additional species were federally listed (i.e., the Giant Manta Ray and the Byrde's Whale) and need to be considered. However, NMFS did not accommodate the EPA's request because NMFS intends to move forward with completing the Gulf Regional Biological Opinion (GRBO), which will also include consultation with EPA on the ODMDS. The GRBO may result in an overall streamlined action, but may also result in a substantial extension of the timeframe within which the EPA was anticipating a receipt of NMFS concurrence for its expansion of the ODMDS. The EPA does not know how long it will take NMFS to complete the GRBO, but the EPA is currently participating in the consultation process.

Following informal discussions and encouragement from NMFS, the EPA has decided to defer consultation under Section 7(d) of the ESA. NMFS verified its concurrence with the EPA's course of action via a May 8<sup>th</sup>, 2020 email.

Section 7(d) of the ESA requires that, after initiation of consultation under Section 7(a)(2), a federal agency "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measure which would not violate subsection (a)(2) of this section." In other words, any action taken prior to completion of consultation must not interfere with the ability of the agency to implement reasonable and prudent measures determined to be necessary to avoid jeopardy to protected species or adverse effects to its critical habitat.

In addition, the existing GRBO is still in effect for all but the newly listed species and so will be referenced in regard to actions to be taken during dredging projects to maintain compliance with those procedures until such time as the new opinion is released.

## **DETERMINATION**

The EPA's expansion of the ODMDS is consistent with Section 7(d) because it does not foreclose either the formulation by NMFS or the implementation by the EPA of any alternatives that might be determined in the consultation to comply with Section 7(a)(2). EPA's action expands the boundaries of the ODMDS, but the action does not authorize any party to use the site. The Army Corps of Engineers (USACE) permits the transit of dredged material for the purpose of disposal at the Mobile ODMDS. The EPA has the authority to implement any conditions or restrictions during the transit and disposal at the Mobile ODMDS that NMFS identifies as a result of consultation. Pursuant to the Marine Protection Research and Sanctuaries Act (MPRSA) Section 103(c), 33 U.S.C. 1413(c), the Army Corps of Engineers shall notify EPA and provide information concerning any permit. If EPA concurs with the permit, either in its entirety or with conditions, the permit shall include such conditions. If the EPA declines to concur with the USACE's determination to issue a permit no permit shall be issued.

The expansion of the Mobile ODMDS is consistent with Section 7(a)(2) and 7(d) of the ESA because EPA retains authority to implement any reasonable and prudent measures determined to be necessary as a result of the consultation proves.